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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

MAXIMILIAN KLEIN, et al.,

Plaintiffs,

vs.

FACEBOOK, INC.,

Defendant.

This Document Relates To: All Actions

Consolidated Case No. 5:20-cv-08570-LHK

**Joint Rule 26(f) Report**

The Hon. Lucy H. Koh

**Joint Rule 26(f) Report**

Pursuant to Federal Rule of Civil Procedure 26(f) and the Court's July 1, 2021 Case Management Order, Dkt. 115, lead counsel for each of the putative Consumer Class, the putative Advertiser Class, and defendant Facebook, Inc. have met and conferred pursuant to Rule 26(f) and respectfully submit this Rule 26(f) Report.

**1. Proposed Discovery Plan Pursuant to Rule 26(f)**

**a. Proposed Changes in the Timing, Form, or Requirement for Initial Disclosures Pursuant to Rule 26(a)**

The parties will exchange Federal Rule of Civil Procedure 26(a) initial disclosures no later than today (August 13, 2021), pursuant to the Court's July 1, 2021 Case Management Order, Dkt. 115.

**b. Subjects on Which Discovery May Be Needed, When Discovery Should be Completed, and Whether Discovery Should be Conducted in Phases or be Limited to or Focused on Particular Issues**

This Court has set a deadline for fact discovery to close on September 2, 2022. Dkts. 82, 115. This Court has additionally held that discovery will not be bifurcated between class discovery and merits discovery. Dkt. 82. Following the Court's April 2, 2021 order, Dkt. 82, Facebook produced to the plaintiffs more than 12 million pages of documents previously provided to the Federal Trade Commission and the House Judiciary Committee in the course of their investigations of Facebook.

**Consumer Plaintiffs' Statement:** The Consumer Class Plaintiffs set forth the subjects on which discovery may be needed in the March 31, 2021 Joint Case Management Statement, Dkt. 78, including documents and testimony from Facebook regarding, among other things: Facebook's representations to consumers regarding Facebook's privacy protections; Facebook's harvesting of consumer data; Facebook's disclosure of consumer data to third parties, including Facebook's sale of consumer data to advertisers; Facebook's intent to deceive consumers regarding Facebook's privacy protections and commercial surveillance; Facebook's surveillance of the websites and apps visited by Facebook's consumers; Facebook's acquisition of competitors and related negotiations;

1 Facebook's copying of competitors; Facebook's policies and practices relating to access to  
2 Facebook's Platform and consumer data; the relevant markets; Facebook's market power and  
3 expansion in the relevant markets; barriers to entry and network effects in the relevant markets; and  
4 the effects of Facebook's policies on competition and consumers. The Consumer Class Plaintiffs  
5 will also seek documents and testimony from non-parties, including Facebook's (former)  
6 competitors. Consumer Plaintiffs reserve the right to contest whether the topics identified in  
7 Facebook's statement concerning the subjects of discovery are relevant and proportional to the  
8 issues in this case.

9 **Advertiser Plaintiffs' Statement:** The Advertiser Class Plaintiffs set forth the subjects on  
10 which discovery may be needed in the March 31, 2021 Joint Case Management Statement, Dkt. 78,  
11 including documents and testimony from Facebook regarding, among other things, Facebook's sales  
12 of and policies related to advertising; Facebook's surveillance of the websites and apps visited by  
13 Facebook's consumers; Facebook's acquisition of competitors and related negotiations; Facebook's  
14 copying of competitors; Facebook's policies and practices relating to access to Facebook's Platform  
15 and consumer data; the relevant markets; Facebook's market power and expansion in the relevant  
16 markets; barriers to entry and network effects in the relevant markets; Facebook's "Jedi Blue"  
17 agreement with Google; and the effects of Facebook's policies on competition and advertisers. The  
18 Advertiser Class Plaintiffs will also seek documents and testimony from non-parties, including  
19 Facebook's (former) competitors. Advertiser Plaintiffs reserve the right to contest whether the  
20 topics identified in Facebook's statement concerning the subjects of discovery are relevant and  
21 proportional to the issues in this case.

22 **Facebook's Statement:** Based on the information available to Facebook at the present time,  
23 Facebook anticipates it will seek discovery regarding the following topics from the plaintiffs:

- 24 • Plaintiffs' use of Facebook, including but not limited to their reasons for using Facebook,  
25 their reasons for advertising on Facebook, and their understanding of Facebook's privacy  
26 protections, privacy policies, or privacy practices;
- 27 • Plaintiffs' time and attention devoted to other websites, applications, online entertainment  
28 services, or other online services;

- 1 • Data or personal information plaintiffs shared with other sources, including other websites,
- 2 applications, online entertainment services, and internet-connected devices;
- 3 • Privacy practices of other websites, applications, online entertainment services, and internet-
- 4 connected devices;
- 5 • Any monetary or pecuniary benefit plaintiffs received in exchange for providing personal
- 6 information or devoting time or attention to any source;
- 7 • Advertising purchases from any source during the relevant time period, including but not
- 8 limited to where the advertisement ran, the cost of the advertisement, any return on the
- 9 advertisement;
- 10 • Plaintiffs' advertisement objectives and strategy;
- 11 • The quality-adjusted price plaintiffs paid for advertisements on any platform used, including
- 12 but not limited to documents concerning the relative quality-adjusted price of advertising on
- 13 Facebook versus other advertising channels, media, or services;
- 14 • Any agreements, arrangements, or understandings with potential or retained counsel for
- 15 either class of plaintiffs;
- 16 • Communications between plaintiffs and members or potential members of the putative class;
- 17 • Plaintiffs' capacity to serve as representative plaintiffs in this matter;
- 18 • Documents concerning any losses, damages, or injuries alleged in the User/Advertiser
- 19 Complaints, including but not limited to documents concerning the efforts to mitigate the
- 20 losses, damages, or injuries alleged and documents concerning the quantification of losses,
- 21 damages, or injuries alleged.

22 Facebook also anticipates seeking documents and testimony from non-parties, including companies  
23 with which it competes.

24 Facebook reserves the right to contest whether the topics identified in the plaintiffs'  
25 respective statements concerning the subjects of discovery are relevant and proportional to the issues  
26 in this case.

1                   **c. Any Issues About Disclosure, Discovery, or Preservation of Electronically**  
2                   **Stored Information, Including the Form or Forms in Which it Should be**  
3                   **Produced**

4           The parties have and are continuing to meet and confer regarding a joint stipulated ESI order,  
5 and have agreed to submit a joint stipulated ESI order as well as any disputes relating to the joint  
6 stipulated ESI order to Judge DeMarchi no later than Friday, August 20, 2021, pursuant to the  
7 discovery dispute resolution procedure outlined in Judge DeMarchi's Standing Order for Civil  
8 Cases.

9                   **d. Any Issues About Claims of Privilege or of Protection as Trial-Preparation**  
10                  **Materials, Including Whether to Ask the Court to Include their Agreement**  
11                  **in an Order under FRE 502**

12           The parties have and are continuing to meet and confer regarding a joint stipulated privilege  
13 protocol, addressing privilege logging, and have agreed to submit a joint stipulated privilege  
14 protocol as well as any disputes relating to the joint stipulated privilege protocol to Judge DeMarchi  
15 no later than Friday, August 20, 2021, pursuant to the discovery dispute resolution procedure  
16 outlined in Judge DeMarchi's Standing Order for Civil Cases.

17           With respect to the 502(d) Agreement, the parties agreed to an interim 502(d) Agreement to  
18 facilitate Facebook's Court-ordered production of documents on May 3, 2021. Dkt. 90. Judge  
19 DeMarchi entered a modified version of the parties' stipulated, interim 502(d) Agreement on May  
20 3, 2021. Dkt. 92. The parties thereafter submitted their disputes on the 502(d) Agreement to Judge  
21 DeMarchi on May 14, 2021, via joint letter briefs. Dkt. 94. Judge DeMarchi held a hearing on the  
22 parties' disputes on May 25, 2021, Dkt. 99, and issued an order on the 502(d) Agreement on June  
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3, 2021, Dkt. 105. In accordance with Judge DeMarchi's order, the parties submitted a revised 502(d) Agreement, which Judge DeMarchi entered on June 14, 2021. Dkts. 106, 107.

**e. What Changes Should be Made in the Limitations on Discovery Imposed Under These Rules or by Local Rule, and What Other Limitations Should be Imposed**

As it relates to depositions, while the parties agree that Plaintiffs collectively may depose more than 10 current Facebook employees in this case, the parties are continuing to meet and confer regarding the appropriate number of depositions. The parties have agreed to submit a joint stipulated deposition protocol addressing the number of depositions, and any disputes relating to the joint stipulated deposition protocol, to Judge DeMarchi no later than Friday, August 20, 2021, pursuant to the discovery dispute resolution procedure outlined in Judge DeMarchi's Standing Order for Civil Cases.

With respect to expert discovery, the parties have and are continuing to meet and confer regarding a joint stipulated expert discovery order, and have agreed to submit a joint stipulated expert discovery order as well as any disputes relating to the joint stipulated expert discovery order to Judge DeMarchi no later than Friday, August 20, 2021, pursuant to the discovery dispute resolution procedure outlined in Judge DeMarchi's Standing Order for Civil Cases.

The parties dispute limitations on interrogatories.

**Plaintiffs' Statement:** Plaintiffs propose that Consumer Plaintiffs can collectively propound 25 interrogatories to Facebook, Advertiser Plaintiffs can collectively propound 25 interrogatories to Facebook, and Facebook can propound 25 interrogatories to each of Consumer Plaintiffs (collectively) and Advertiser Plaintiffs (collectively), with the right for any party to seek leave to serve additional interrogatories. As set forth below, Plaintiffs' proposal provides Plaintiffs fewer interrogatories than otherwise provided by Rule 33's default limit of 25 interrogatories *per party*.

Facebook's proposal runs contrary to Rule 33(a)'s plain reading and how courts have interpreted and applied the rule. Rule 33(a) provides 25 written interrogatories *per party*. See Fed. R. Civ. P. 33(a); *Dixon v. Spurlin*, No. 1:18-cv-00133, 2020 WL 6707325, at \*3 (W.D. La. Nov. 13,

2020) (“Under the plain language of Rule 33(a), *each Plaintiff* is entitled to propound upon [defendant] 25 interrogatories, including all discrete subparts, without leave of court.”) (emphasis added). Courts have routinely applied this construction of Rule 33 in class actions involving multiple class representatives. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-5944 JST, 2015 WL 13756256, at \*2 (N.D. Cal. Dec. 17, 2015) (Tigar, J.) (rejecting argument that putative class had exceeded twenty-five interrogatory limit “given that each named plaintiff is entitled to serve 25 interrogatories.”); *Zamora v. D’Arrigo Bros. Co. of Cal.*, No. 04-cv-00047-JW, 2006 WL 931728, at \*4 (N.D. Cal. Apr. 11, 2006) (Lloyd, J.) (similar). And, contrary to Facebook’s position, courts in antitrust class actions involving multiple classes (like this one), have apportioned interrogatories at a minimum *by class*. *See In re Optical Disk Drive Antitrust Litigation*, Case No. 3:10-md-02143-RS (N.D. Cal.), Dkt. 606 at 3 (July 17, 2012) (“The DPPs and the IPPs will *each be permitted* to propound up to 50 non-duplicative interrogatories of each Defendant family.”) (Illston, J.) (emphasis added).

While some courts have determined that “in some instances nominally separate parties should be considered one party for purposes of the 25–interrogatory limitation,” Consumer Plaintiffs and Advertiser Plaintiffs are *not* “nominally separate parties.” *Vinton v. Adam Aircraft Indus., Inc.*, 232 F.R.D. 650, 664 (D. Colo. 2005). Consumer Plaintiffs and Advertiser Plaintiffs assert different claims, based on different theories of liability and damages, turning on different events in different relevant markets, which informed the Court’s decision to appoint separate counsel for each class. *Cf. Gucci Am., Inc. v. Exclusive Imports Int’l*, No. 99-cv-11490-RCC, 2002 WL 1870293, at \*5 (S.D.N.Y. Aug. 13, 2002) (“where, as here, the parties are acting in unison and are represented by the same counsel, they may be treated as one party for purposes of the interrogatory limits.”). Given these differences and the non-overlapping discovery sought by Consumer and Advertiser Plaintiffs, Facebook’s proposal for multiple plaintiffs across different classes to collectively split 30 interrogatories is unworkable. Facebook’s cited cases do not suggest otherwise. *See, e.g., In re Google Inc. Gmail Litigation*, 13-MD-02430-LHK (N.D. Cal. May 8, 2013) (allowing Plaintiffs with common claims to serve 50 interrogatories).

**Facebook’s Statement:** Facebook proposes the following common interrogatory structure:

- 1           • Advertisers and Users may collectively serve 20 common interrogatories on
- 2           Facebook
- 3           • Advertisers may serve 5 unique interrogatories on Facebook
- 4           • Users may serve 5 unique interrogatories on Facebook
- 5           • Facebook may serve 20 common interrogatories on plaintiffs, as well as 5
- 6           interrogatories on the Advertisers and 5 interrogatories on the Users.

7 This proposal allows each party access to 25 interrogatories, while also eliminating the potential for  
8 unnecessarily duplicative or burdensome use of interrogatories.

9           Absent some common-sense limitations on the use of interrogatories in this case,  
10 interrogatories risk becoming a tool for harassment rather than discovery. The Advertisers' and  
11 Users' complaints address many of the same events, including Facebook's acquisitions of Instagram  
12 and WhatsApp; Facebook's acquisition of Onavo and purported use of Onavo data for market  
13 research; Facebook's purported "copying" of popular features associated with other apps; and  
14 policies on access to Facebook data through Facebook Platform. Because the two classes will  
15 therefore be seeking substantially overlapping information from Facebook, the most efficient  
16 approach would be to require the two classes to serve their interrogatories jointly, and for those joint  
17 interrogatories to be subject to Rule 33's presumptive 25-interrogatory limit.

18           A common interrogatory structure will increase efficiency, both as between plaintiffs'  
19 counsel and for Facebook. Common interrogatories will eliminate a situation where Facebook must  
20 respond to similar but not identical requests from each group of plaintiffs' counsel. They will also  
21 inspire efficiency among the large group of counsel on the plaintiffs' side, because counsel for each  
22 class will not be carrying out parallel negotiations with Facebook over objections and scope,  
23 reviewing similar-but-not-identical responses to overlapping interrogatories, or independently  
24 seeking assistance from the Court to resolve any disputes between the parties. At bottom, a common  
25 interrogatory structure will best implement the goal of the presumptive interrogatory limits in Rule  
26 33, which is to "forc[e] counsel to make the best use of the limited number of interrogatories through  
27 skillful and thoughtful drafting designed to accomplish a legitimate purpose." Manual for Complex  
28 Litigation § 11.46 (4th ed. 2004). Indeed, this Court has imposed similar interrogatory limits in



1 other complex cases. See Case Management Order, *In re Google Inc. Gmail Litigation*, 13-MD-  
 2 02430-LHK (N.D. Cal. May 8, 2013) (setting single limit of 50 interrogatories for eight classes of  
 3 plaintiffs in consolidated class action against Google); Case Management Order, *National Urban*  
 4 *League et al. v. Ross*, 20-cv-05799-LHK (N.D. Cal. Nov. 13, 2020) (setting single limit on  
 5 interrogatories for multiple plaintiffs).

6 Facebook's approach would similarly limit its own use of interrogatories. Under Facebook's  
 7 proposal, Facebook would be permitted to serve no more than 25 common interrogatories on the  
 8 named plaintiffs, which the named plaintiffs would then answer jointly (for all plaintiffs), on a per-  
 9 class basis, or on a per-plaintiff basis, depending on how the response to the interrogatory varied  
 10 across the named plaintiffs, consistent with their Rule 33 obligation to answer interrogatories  
 11 "fully." Fed. R. Civ. P. 33(b)(3). See also *Marbet v. City of Portland*, 2004 WL 1737737, at \*2 (D.  
 12 Or. Aug. 3, 2004) (compelling separate answers to interrogatories from named plaintiffs where  
 13 responses differed between plaintiffs). This, too, will increase efficiency on both sides, allowing a  
 14 single lawyer (or group of lawyers) on plaintiffs' side to draft all common responses and objections,  
 15 rather than requiring counsel to draft eleven separate sets of responses that are common across the  
 16 class.

17 Finally, Facebook recognize that the limits in Rule 33 are presumptive, and will negotiate in  
 18 good faith to increase the proposed limits if, as discovery progresses, plaintiffs are able to justify  
 19 the need for additional specific requests.

20 **f. Any Other Orders that the Court Should Issue Under Rule 26(c) or Under**  
 21 **Rule 16(b) and (c).**

22 With respect to the Protective Order, the parties agreed to an interim Protective Order to  
 23 facilitate Facebook's Court-ordered production of documents on May 3, 2021. Dkt. 89. Judge  
 24 DeMarchi entered a modified version of the parties' stipulated, interim Protective Order on May 3,  
 25 2021. Dkt. 91. The parties thereafter submitted their disputes on the Protective Order to Judge  
 26 DeMarchi on May 14, 2021, via joint letter briefs. Dkt. 95. Judge DeMarchi held a hearing on the  
 27 parties' disputes on May 25, 2021, Dkt. 99, and issued an order on the Protective Order on June 14,  
 28

2021, Dkt. 108. In accordance with Judge DeMarchi's order, the parties submitted a revised Protective Order, which Judge DeMarchi entered on June 14, 2021. Dkts. 110, 111.

With respect to the Scheduling Order, this Court previously set a case schedule in its April 2, 2021 Case Management Order (Dkt. 82) and its July 1, 2021 Case Management Order (Dkt. 115).

DATED: August 13, 2021

Respectfully submitted,

By: /s/ Yavar Bathaee

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1                                    **ATTESTATION OF STEPHEN A. SWEDLOW**

2            This document is being filed through the Electronic Case Filing (ECF) system by attorney  
3 Stephen A. Swedlow. By his signature, Mr. Swedlow attests that he has obtained concurrence in  
4 the filing of this document from each of the attorneys identified on the caption page and in the above  
5 signature block.

6            Dated: August 13, 2021

By /s/ Stephen A. Swedlow

Stephen A. Swedlow

9                                    **CERTIFICATE OF SERVICE**

10           I hereby certify that on this 13th day of August 2021, I electronically transmitted the  
11 foregoing document to the Clerk's Office using the CM/ECF System, causing the document to be  
12 electronically served on all attorneys of record.  
13

14                                    By /s/ Stephen A. Swedlow

Stephen A. Swedlow